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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

9 JAMES RAY WALKER,  
10 Petitioner,  
11 vs.  
12 RENEE BAKER, *et al.*,  
13 Respondents.  
14

2:15-cv-01240-RFB-GWF

## ORDER

16 On August 13, 2015, petitioner Walker filed a motion asking the court to establish a deadline of  
17 December 23, 2015, for him to file an amended petition for writ of habeas corpus. ECF No. 14. A few  
18 days later, on August 17, 2015, he filed a motion for leave to conduct discovery. ECF No. 17.

19 On December 23, 2015, without the court having ruled on his motion to establish a deadline,  
20 Walker filed an amended habeas petition.<sup>1</sup> ECF No. 40. The following day, the respondents filed a  
21 motion to strike that pleading, arguing that Walker had not followed the Federal Rules of Civil  
22 Procedure and the amended petition was a fugitive document. ECF No. 57. Then, on January 8, 2016,  
23 Walker filed a motion asking this court to stay these proceedings and hold them in abeyance

<sup>1</sup> Walker represents that it was necessary to file the petition by December 23, 2015, in order to meet the Antiterrorism and Effective Death Penalty Act (AEDPA) deadline for his amended claims.

1 pending the exhaustion of his remedies in state court. ECF No. 59. This order decides these pending  
 2 motions.

3       1. *The Amended Petition.*

4       As an initial matter, the court shall permit, *nunc pro tunc*, the filing of the amended petition.  
 5 Under 28 U.S.C. § 2242, a petition for writ of habeas corpus “may be amended or supplemented as  
 6 provided in the rules of procedure applicable to civil actions.” Federal Rule of Civil Procedure 15(a)(1)  
 7 provides that “[a] party may amend its pleading once as a matter of course within: (A) 21 days after  
 8 serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service  
 9 of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is  
 10 earlier.” Fed. R. Civ. P. 15(a)(1). “In all other cases, a party may amend its pleading only with the  
 11 opposing party's written consent or the court's leave. The court should freely give leave when justice  
 12 so requires.” Fed. R. Civ. P. 15(a)(2). Whether to grant leave to amend rests in the sound discretion of  
 13 the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9<sup>th</sup> Cir. 1995) (citing *Outdoor Sys., Inc. v. City*  
 14 *of Mesa*, 997 F.2d 604, 614 (9<sup>th</sup> Cir. 1993)). “In exercising its discretion ‘a court must be guided by the  
 15 underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or  
 16 technicalities.’” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting *United*  
 17 *States v. Webb*, 655 F.2d 977, 979 (9<sup>th</sup> Cir. 1981)).

18       Because respondents have yet to file a responsive pleading, Walker was arguably entitled to  
 19 amend his petition “as a matter of course” under Rule 15(a)(1)(B).<sup>2</sup> In any case, this court finds that the  
 20 factors that normally weigh against allowing amendment – i.e., bad faith, undue delay, prejudice to the

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21       2 Respondents argue that leave of court is required because Walker failed to file his amended  
 22 petition within 21 days of service as required by Rule 15(a)(1)(A). However, the Advisory Committee  
 23 notes for the 2009 Amendments to Rule 15(a)(1) suggest that, for pleadings to which a responsive  
 24 pleading is required, the rule creates an open period for amending as a matter course that runs  
 25 continuously *from* the date of initial service of the pleading to be amended *until* 21 days after service  
 26 of the responsive pleading. That is, there is not necessarily a closed period between the end of the 21  
 day period under Rule 15(a)(1)(A) and the date the responsive pleading is served for the purposes of  
 Rule 15(a)(1)(B). Under either interpretation of the rule, Walker would be permitted to amend his  
 petition as a matter of course once a responsive pleading is served.

1 opposing party – are absent here. *See Bonin*, 59 F.3d at 845 (discussing factors to be considered under  
 2 Fed. R. Civ. P. 15(a)(2)). In addition, Walker’s interest in having all of his potential claims for relief  
 3 placed before the court outweighs respondents’ arguments in opposition to allowing the amended  
 4 pleading. Thus, leave of court to amend the petition is warranted. *See Webb*, 655 F.2d at 979 (“Rule  
 5 15’s policy of favoring amendments to pleadings should be applied with ‘extreme liberality.’” (Citation  
 6 omitted.)). Also, Walker has demonstrated good cause to amend the court’s scheduling order. *See Fed.*  
 7 *R. Civ. P. 16(b)(4)*. Accordingly, respondents’ motion to strike the amended petition shall be denied.

8       2. *Stay and Abeyance*.

9           Walker’s motion for stay and abeyance is based on *Rhines v. Weber*, 544 U.S. 269 (2005). In  
 10 *Rhines*, the Supreme Court condoned the use of stay and abeyance to facilitate habeas petitioners’ return  
 11 to state court to exhaust claims, but also placed limitations upon the discretion of the district court to  
 12 allow such a procedure. The *Rhines* Court stated:

13           [STAY AND ABNEYANCE SHOULD BE AVAILABLE ONLY IN LIMITED CIRCUMSTANCES. BECAUSE GRANTING  
 14 A STAY EFFECTIVELY EXCUSES A PETITIONER’S FAILURE TO PRESENT HIS CLAIMS FIRST TO THE STATE  
 15 COURTS, STAY AND ABNEYANCE IS ONLY APPROPRIATE WHEN THE DISTRICT COURT DETERMINES THERE WAS  
 16 GOOD CAUSE FOR THE PETITIONER’S FAILURE TO EXHAUST HIS CLAIMS FIRST IN STATE COURT. MOREOVER,  
 17 EVEN IF A PETITIONER HAD GOOD CAUSE FOR THAT FAILURE, THE DISTRICT COURT WOULD ABUSE ITS  
 DISCRETION IF IT WERE TO GRANT HIM A STAY WHEN HIS UNEXHAUSTED CLAIMS ARE PLAINLY  
 MERITLESS. Cf. 28 U.S.C. § 2254(b)(2) (“AN APPLICATION FOR A WRIT OF HABEAS CORPUS MAY  
 BE DENIED ON THE MERITS, NOTWITHSTANDING THE FAILURE OF THE APPLICANT TO EXHAUST THE  
 REMEDIES AVAILABLE IN THE COURTS OF THE STATE”).]

18 *Rhines*, 544 U.S. at 277.

19           The Court in *Rhines* went on to state that, “[I]t likely would be an abuse of discretion for a  
 20 district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure  
 21 to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the  
 22 petitioner engaged in intentionally dilatory litigation tactics.” *Id.* at 278.

23           Thus, the court may stay a petition containing both exhausted and unexhausted claims if: (1) the  
 24 habeas petitioner has good cause; (2) the unexhausted claims are potentially meritorious; and (3)  
 25 petitioner has not engaged in dilatory litigation tactics. *Rhines*, 544 U.S. at 277; *Gonzalez v. Wong*, 667

1 F.3d 965, 977–80 (9<sup>th</sup> Cir. 2011). “[G]ood cause turns on whether the petitioner can set forth a  
 2 reasonable excuse, supported by sufficient evidence, to justify [the failure to exhaust a claim in state  
 3 court].” *Blake v. Baker*, 745 F.3d 977, 982 (9<sup>th</sup> Cir. 2014). “While a bald assertion cannot amount to  
 4 a showing of good cause, a reasonable excuse, supported by evidence to justify a petitioner’s failure to  
 5 exhaust, will.” *Id.* An indication that the standard is not particularly stringent can be found in *Pace v.*  
 6 *DiGuglielmo*, 544 U.S. 408 (2005), where the Supreme Court stated that: “[a] petitioner’s reasonable  
 7 confusion about whether a state filing would be timely will ordinarily constitute ‘good cause’ to excuse  
 8 his failure to exhaust.” *Pace*, 544 U.S. at 416 (citing *Rhines*, 544 U.S. at 278).

9 Here, Walker identifies Claims Two, Three, Five, Eight(B), Eleven(C), Fifteen (D-M), Sixteen,  
 10 Eighteen, Twenty, and Twenty-two through Twenty-six as potentially meritorious claims that are  
 11 unexhausted. He argues that his failure to exhaust these claims was due to ineffective assistance of  
 12 counsel (IAC) in his state post-conviction proceeding. In this regard, he draws parallels between his  
 13 circumstances and those of the petitioner in *Blake*, where the court found that the petitioner’s showing  
 14 of state post-conviction IAC satisfied the *Rhines* good cause standard. See *Blake*, 745 F.3d at 984.

15 In *Blake*, the court held that stay and abeyance was warranted because Blake’s ineffective  
 16 assistance of post-conviction claim was “supported by evidence that his state post-conviction counsel  
 17 failed to discover, investigate, and present to the state courts the readily available evidence of Blake’s  
 18 abusive upbringing and compromised mental condition.” *Blake*, 745 F.3d at 983. Walker has supported  
 19 his state post-conviction IAC claim with similar evidence. For example, he has presented documentation  
 20 describing his traumatic childhood and the severe conditions he endured while incarcerated in the  
 21 Nevada prison system for twenty-two years between 1978 and 2000. He has also presented reports from  
 22 mental health experts indicating that these experiences left him with PTSD. In addition, he has  
 23 presented evidence detailing his relapse into alcohol abuse upon release from prison and how that abuse  
 24 escalated until he committed the crimes for which he is now incarcerated and sentenced to death.

25 Respondents argue that Walker’s allegation of ineffective assistance of post-conviction counsel  
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1 is not grounds for a stay because, unlike the petitioner in *Blake*, he has not made a sufficient showing  
 2 that state post-conviction counsel's performance was defective under the standard established in  
 3 *Strickland v. Washington*, 466 U.S. 668 (1984). In this regard, they point to post-conviction counsel's  
 4 attempt to develop mitigating evidence, only to be foreclosed from doing so by the state district court's  
 5 denial of investigative resources. In this court's view, however, state court counsel's lack of  
 6 investigative resources only strengthens Walker's good cause argument. Accordingly, the court finds  
 7 that Walker has met the *Rhines* good cause requirement.<sup>3</sup>

8 With respect to whether Walker has engaged in intentionally dilatory tactics, respondents contend  
 9 that Walker has unreasonably delayed in filing his second state post-conviction petition. According to  
 10 the respondents, Walker's current counsel met with him as early as December 2014, but, as of the date  
 11 of respondents' opposition to the stay (January 15, 2016), the state petition had yet to be filed.  
 12 Respondents also point out that Walker first disclosed that he intended to seek stay and abeyance in  
 13 September of 2015 (ECF No. 31, p. 12), but waited another four months to file his motion.

14 This court notes, however, that Walker filed his motion for stay and abeyance approximately  
 15 three weeks after filing his amended petition. The more common practice is to wait until respondents  
 16 raise lack of exhaustion as an affirmative defense. Thus, in that respect, Walker's motion for stay and  
 17 abeyance could be considered early rather than late. Moreover, the court takes judicial notice of the fact  
 18 that Walker filed his second state petition in state district court on February 16, 2016, which is within  
 19 one year of the conclusion of his first state habeas proceeding. In sum, the record does not establish that  
 20 Walker has engaged "intentionally dilatory litigation tactics." *Rhines*, 544 U.S. at 278.

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23       <sup>3</sup> Walker argues that post-conviction counsel was deficient in developing other claims besides  
 24 trial counsel's ineffectiveness in the penalty phase – those being, that counsel were ineffective in the  
 25 guilt phase for failing to impeach the state's identification of Walker and in failing to challenge the  
 26 State's DNA evidence. Because the court finds good cause based on post-conviction counsel's failure  
 to develop the penalty phase IAC claim, it need not address post-conviction counsel's failure to develop  
 the guilt phase IAC claims.

1        Respondents do not dispute that Walker's petition contains unexhausted claims that are  
2 potentially meritorious.

3        Having met the requirements under *Rhines*, Walker has shown that a stay is warranted to allow  
4 him to exhaust state court remedies before moving forward with this federal habeas action.      The  
5 court will stay this case. This will be the last time that the court imposes a stay to facilitate Walker's  
6 exhaustion of claims in state court. Walker must exhaust all of his unexhausted claims in state court  
7 during the stay of this action imposed pursuant to this order. The court does not here make a ruling, or  
8 suggest any opinion, with respect to whether Walker can make the showing necessary to excuse any  
9 procedural default, or any limitations bar, that might exist as a result of his delay in discovering and  
10 pleading his unexhausted claims.

11       Finally, because this action will be stayed and held in abeyance, Walker's motion for leave to  
12 conduct discovery (ECF No. 17) shall be denied without prejudice.

13       **IT IS THEREFORE ORDERED** that petitioner's for an amended petition filing deadline (ECF  
14 No. 14) is GRANTED *nunc pro tunc* as of December 23, 2015. Respondents' motion to strike (ECF No.  
15 57) is DENIED.

16       **IT IS FURTHER ORDERED** that petitioner's motion for stay and abeyance (ECF No. 59) is  
17 GRANTED. This action is STAYED, while petitioner exhausts, in state court, all his unexhausted  
18 claims for habeas corpus relief.

19       **IT IS FURTHER ORDERED** that, on or before June 15, 2016, petitioner shall file and serve  
20 a status report, describing the status of his state-court proceedings. Thereafter, during the stay of this  
21 action, petitioner shall file such a status report every 6 months (on or before December 15, 2016; June  
22 15, 2017; December 15, 2017; etc.). Respondents may, if necessary, file and serve a response to any  
23 such status report within 15 days after its service. If necessary, petitioner may reply within 15 days of  
24 service of the response.

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**IT IS FURTHER ORDERED** that, following the conclusion of state court proceedings, petitioner shall, within **30 days**, make a motion to lift the stay.

**IT IS FURTHER ORDERED** that this action shall be subject to dismissal upon a motion by respondents if petitioner does not comply with the time limits in this order, or if he otherwise fails to proceed with diligence during the stay imposed pursuant to this order.

**IT IS FURTHER ORDERED** that petitioner's motion for leave to conduct discovery (ECF No. 17) is DENIED without prejudice. Respondents' motion for leave to file a sur-reply to motion for leave to conduct discovery (ECF No. 64) is GRANTED *nunc pro tunc* as of January 15, 2016.

DATED: March 30, 2016.

  
RICHARD F. BOULWARE, II  
UNITED STATES DISTRICT JUDGE